

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

March 22, 2000

IN RE:

**PETITION OF NEXTLINK TENNESSEE,
L.L.C. FOR ARBITRATION OF
INTERCONNECTION AGREEMENT WITH
BELLSOUTH TELECOMMUNICATIONS, INC.**

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) **DOCKET NO. 98-00123**
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ORDER DENYING NEXTLINK'S PETITION FOR RECONSIDERATION

This matter came before the Tennessee Regulatory Authority (the "Authority") during a regularly scheduled Authority Conference held on September 14, 1999, on the Petition of NEXTLINK Tennessee, Inc. (formerly NEXTLINK Tennessee, L.L.C., hereafter "NEXTLINK") requesting the Authority to reconsider its First Order of Arbitration Award ("First Order"), which was issued as a result of an arbitration with BellSouth Telecommunications, Inc. ("BellSouth"). NEXTLINK specifically requests reconsideration of the Arbitrators' resolution of Issues 3, 4, and 12 in the First Order after the subsequent release of the United States Supreme Court's opinion in *AT&T Corp. v. Iowa Utils. Board*, 119 S.Ct. 721, 142 L.Ed.2d 835 (1999) ("*Iowa Utils.*").

Issues 3, 4, and 12 involve the following: (1) whether Digital Cross Connect Systems ("DCS") are distinct elements from transport that NEXTLINK may only access by obtaining an equivalent retail service offered by BellSouth; (2) whether extended loops and loops served by remote switching units ("RSUs") are combinations; (3) whether any combination of network elements must be performed by a third party vendor; and (4) whether NEXTLINK must pay a

recombination charge for any “combination” of network elements, in an amount that BellSouth may unilaterally determine.

On May 28, 1999, NEXTLINK filed its *Petition for Reconsideration* (the “Petition”). On June 16, 1999, BellSouth filed its *Response to NEXTLINK’s Petition for Reconsideration*. On June 29, 1999, NEXTLINK filed its *Reply to BellSouth’s Response to Petition for Reconsideration*. On August 31, 1999, the parties filed briefs concerning the extent of the Authority’s ability to scrutinize interconnection agreements pursuant to 47 U.S.C. § 252(e). Subsequent to the filing of these pleadings and briefs, the parties were given the opportunity to present oral argument concerning NEXTLINK’s request for reconsideration at the September 14, 1999 Authority Conference.

In its Petition, NEXTLINK states that the Supreme Court’s opinion in *Iowa Utils.* altered the law prevailing on October 6, 1998, the date the Arbitrators first rendered their decision in this matter. Therefore, because the *Iowa Utils.* opinion reverses certain parts of such prevailing law, NEXTLINK asserts that reconsideration is appropriate.

As part of its request for reconsideration, NEXTLINK also asserts that the First Order was deficient because it failed to meet the requirements of Tenn. Code Ann. § 4-5-314(c). Tenn. Code Ann. § 4-5-314(c) requires that an initial or final order be in writing, include findings of fact, conclusions of law as well as the policy reasons therefore, and the remedy prescribed if appropriate; NEXTLINK asserts that the Arbitrators failed to follow the directives of this statute. In addition, NEXTLINK asserts that this section of the Uniform Administrative Procedures Act (“UAPA”) does not make any exceptions for whether an order arises from an arbitration proceeding or any other type of proceeding. NEXTLINK maintains that the aforementioned requirements for written orders afford due process protection to the parties, because the parties

are informed of available remedies, such as reconsideration. NEXTLINK asserts that reconsideration under the UAPA applies equally to all orders, including those arising from arbitration.

In response, BellSouth asserts that 47 U.S.C. § 252(b)(4)(c) provides a nine-month time limit for a state commission to conclude the resolution of any unresolved issues in an arbitration conducted pursuant to Section 252. According to BellSouth, NEXTLINK's Petition acknowledges that due to the resulting remand to the Eighth Circuit, the *Iowa Utils.* opinion is not final relative to the issues that the Supreme Court addressed. As a result of the Supreme Court's remand, the Eighth Circuit is now addressing the FCC rules on a substantive basis, as opposed to a jurisdictional basis, as had been done by the Eighth Circuit in *Iowa Utilities Board v. Federal Communications Commission*, 120 F.3d 753, 803 (8th Cir. 1997), *cert. granted*, 522 U.S. 1089, 118 S.Ct. 879 (1998) *aff'd in part and rev'd in part*, 525 U.S. 366, 119 S.Ct. 721, 142 L.Ed.2d 835 (1999). In addition, BellSouth notes that the *Iowa Utils.* opinion is not conclusive as to the final state of the law because, among other things, the FCC is taking action to revisit its list of unbundled network elements.

BellSouth asserts that the Arbitrators, as a practical matter, concluded this arbitration based on the law that existed at the time the arbitration was heard. According to BellSouth, any changes in the law resulting from the *Iowa Utils.* opinion will be considered by the Directors when the Directors review the resulting interconnection agreement. BellSouth notes that NEXTLINK is provided additional relief in the form of judicial review of the First Order, which NEXTLINK is free to pursue at anytime.

NEXTLINK responds by asserting that it should be permitted to explore the issues regarding the Supreme Court's decision and that the Arbitrators should review their original

rulings in light of the *Iowa Utils.* opinion, in order that the parties have finality in this matter and have the opportunity to enter into an interconnection agreement.

In consideration of the foregoing, and after careful review of the record, the Petition and the responses thereto, as well as the oral arguments of the parties, the Authority finds and concludes as follows:

- 1) The Arbitrators applied the law that was prevailing at the time the arbitration decisions were rendered in this matter;
- 2) Due to the nine-month statutory deadline imposed by 47 U.S.C. § 252(b)(4)(c), as well as the duties imposed upon the Authority by Tenn. Code Ann. § 8-44-101 (Open Meetings Law), the Arbitrators must announce their decisions concerning issues pending in arbitration proceedings via public deliberations. Thereafter, these decisions are reduced to writing in a final order;
- 3) This arbitration has been completed within the deadline established by the parties and the Arbitrators;
- 4) No provision under the federal Telecommunications Act of 1996 expressly provides for the reconsideration of a previously completed arbitration proceeding; and
- 5) NEXTLINK's pleadings fail to discuss applicable legal authorities that support NEXTLINK's proposition that an arbitration decision can be reconsidered.

As a result of these findings and conclusions, the Authority further finds that the parties to this proceeding shall submit an interconnection agreement that incorporates the Arbitrators decisions. Once an interconnection agreement is filed by the parties, the Authority shall accept or reject such agreement based on the current status of the law and whether the agreement

complies with the statutory standards set forth in the federal Telecommunications Act, irrespective of what occurred in the arbitration proceeding.


Based upon the foregoing findings and conclusions, the Authority unanimously denies NEXTLINK's *Petition for Reconsideration*. As a result of this denial, the parties are required to file an interconnection agreement within thirty (30) days of the September 14, 1999, Authority Conference. If the parties remain in serious good-faith negotiations and both parties deem that progress is being made, then the parties can request additional time from the Authority within which to file an agreement. Further, the parties are advised that they are under an obligation to file an interconnection agreement that is in compliance with the *Iowa Utils.* opinion.

IT IS THEREFORE ORDERED THAT:

1. *NEXTLINK's Petition for Reconsideration* of the Authority's First Order of Arbitration Award is denied; and
2. The parties shall file an interconnection agreement that is compliant with the decision of the United States Supreme Court in *AT&T Corp. v. Iowa Utils. Board*, 119 S.Ct. 721, 142 L.Ed.2d 835 (1999) within thirty (30) days from September 14, 1999, unless the parties request additional time as permitted herein.



Melvin L. Malone, Chairman



H. Lynn Greer, Jr., Director



Sara Kyle, Director

ATTEST:



K. David Waddell, Executive Secretary